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No. 90-1419

In The
Supreme Court of the United States
October Term, 1990

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT WINDSOR MINERALS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTION

Windsor Minerals, Inc. ("Windsor") brings a unique perspective to this case.[1] It is the only party that has actually used the railroad services provided by Boston & Maine Corporation ("B&M") over the Connecticut River Line. Based

[1]Windsor is a subsidiary of Cyprus Minerals Company.

on that experience, Windsor has consistently supported, before the Interstate Commerce Commission (''Commission'') and in the court below, the acquisition by Petitioner National Railroad Passenger Corporation (''Amtrak'') of the Connecticut River Line, and the exemption of Amtrak's subsequent conveyance of that Line to Petitioner Central Vermont Railway, Inc. (''Central Vermont''). Windsor urges this Court to grant the petition for a writ of certiorari filed by Amtrak and Central Vermont (hereinafter ''Amtrak Petition'').

REASONS FOR GRANTING THE WRIT

Windsor fully supports the reasons for review by this Court cited in the Amtrak Petition. In addition, review is necessary because of the absence of record support for the lower court's key conclusion that Amtrak's needs could have been met by acquiring some lesser interest in the Line that would have left ownership and control in B&M's hands.

Throughout this case, B&M has sought to portray itself as a responsible railroad, living up to its common carrier obligations under the Interstate Commerce Act and unlawfully victimized when it refused to subsidize Amtrak's passenger operations through track upgrades. Nothing could be farther from the truth. Not only did B&M not meet its contractual maintenance and service obligations to Amtrak, leading to termination of *Montrealer* service in 1987[2], but B&M's service over the Line was not even adequate for freight shippers.

The most active of the shipper parties in the Commission proceedings (all of which opposed retention of the Line by B&M) was Windsor, a talc shipper located on the Green Mountain Railroad eighteen miles from Bellows Falls, Vermont, the

[2]*See* Amtrak Petition at 4-5 and 26a.

point on the Line at which the Green Mountain interchanged traffic with B&M. Windsor shipped to customers throughout the United States, with the exception of the far west. Because Central Vermont's trackage rights agreement with B&M did not permit the Green Mountain to interchange traffic with Central Vermont at Bellows Falls, Windsor had to rely on B&M for service over the Line on its southbound shipments.

Windsor testified before the ICC that, as early as 1986, B&M service began to decline markedly, as B&M let its track deteriorate and proved itself unable to move cars when needed on the Connecticut River Line. Windsor began a series of efforts before the Commission to induce B&M to comply with its common carrier obligations. Because of B&M's abysmal service, Windsor's efforts included seeking and obtaining a temporary reroute order under 49 U.S.C. § 11124, which permits the Commission to order traffic handled over other lines when it finds that a rail carrier ''cannot transport the traffic offered to it in a manner that properly serves the public.'' Windsor also filed an informal complaint concerning B&M's poor service in January 1988, three months before Amtrak filed its application.

In addition, Windsor testified that it pursued self-help measures, sending its southbound railroad traffic *north* in a circuitous routing of almost 300 miles, in order to avoid rail service via B&M. This was a desperate measure, and it was a burden for Windsor to absorb the extra costs of up to $12 per ton on its low-value, long-distance bulk freight shipments in the competitive talc market. However, the alternative was to lose customers due to B&M's inadequate service.

The record below negates both B&M's claim that the Amtrak acquisition would impair its ability to fulfill its common carrier obligations, and B&M's contention that Amtrak should have sought only trackage rights or an easement, with

ownership left in B&M's hands. Since either of these conditions establishes Amtrak's need for the Line, the statutory requirements were more than met. So long as B&M retained ownership of the Line it would retain control over the performance of maintenance, the lack of which led to the original cessation of *Montrealer* service. On the other hand, conveyance of the Connecticut River Line to Amtrak and reconveyance to Central Vermont for repair and maintenance, with trackage rights preserved for the B&M, *enhanced* B&M's ability to meet its common carrier obligations, and gave Amtrak the assurance it needed that the Line could be both upgraded and maintained in good condition.[3]

B&M allowed its track and service to deteriorate to the point of being almost beyond repair, and yet it refused to sell the Connecticut River Line to Amtrak on reasonable terms or to provide dependable rail service. Amtrak was thus confronted with a "dog in the manger" — an incumbent freight railroad that was not only unwilling to live up to its own service and maintenance obligations but also unwilling to step aside so others could implement the necessary remedial measures. This is precisely the situation in which Amtrak's condemnation power is most needed.

[3]Thus, the last answer in the colloquy quoted in Judge Ginsburg's dissent in the decision below (Amtrak Petition at 27a) was not correct.

CONCLUSION

For the foregoing reasons, and those set forth in Amtrak's Petition, the requested writ of certiorari should be granted.

Respectfully submitted,

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